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 The Upper Deck Company

15
 16 **UNITED STATES DISTRICT COURT**
 17 **DISTRICT OF NEVADA**

18 ANIPLEX, INCORPORATED, a Japanese
 corporation,
 19 Plaintiff and Counter-Defendant,
 20 vs.

21 THE UPPER DECK COMPANY, a Nevada
 corporation,
 22 Defendant and
 23 Counterclaimant.

) Case No. 2:08-CV-00442-HDM-PAL
)
) [Assigned for all purposes to the
) Hon. Howard D. McKibben]

) **DECLARATION OF JOHN SEPENUK**
) **IN SUPPORT OF DEFENDANT AND**
) **COUNTERCLAIMANT THE UPPER**
) **DECK COMPANY'S MOTION FOR**
) **SUMMARY JUDGMENT OR, IN THE**
) **ALTERNATIVE, FOR SUMMARY**
) **ADJUDICATION OF ISSUES**

) **ORAL ARGUMENT REQUESTED**

) [Notice of Motion and Motion for Summary
) Judgment or, in the Alternative, for Summary
) Adjudication; Memorandum of Points and
) Authorities in Support Thereof; Statement of
) Undisputed Facts; and Declaration of
) Kristina Fredericks Filed Concurrently
) Herewith]

1 I, John Sepenuk, declare as follows:

2 1. I am a former employee of The Upper Deck Company ("Upper Deck"). I make this
3 declaration in support of Upper Deck's Motion for Summary Judgment or, in the Alternative for
4 Summary Adjudication of Issues. Unless otherwise stated, I have personal knowledge of the
5 matters stated herein and, if called upon, I could and would competently testify hereto. As to those
6 matters about which I do not have personal knowledge, my statements are made upon information
7 and belief.

8 2. Upper Deck is incorporated in Nevada and manufactures and sells sports and
9 entertainment trading cards and trading card games ("TCG"). Upper Deck's products include TCG
10 involving animated characters and entertainment properties. I worked on and off as an employee or
11 consultant for Upper Deck from 1997 through November 2008. I was initially a marketing
12 manager for the Asia Pacific territories. From April 2003 until November 2008, I was employed at
13 Upper Deck as Managing Director of Asia Pacific. Generally, my responsibilities as Managing
14 Director of Asia Pacific included managing Upper Deck's relationship with Konami regarding the
15 Yu-Gi-Oh! trading card game and overseeing the Asia Pacific territory for sales and distribution of
16 Upper Deck's core products which were trading cards and some collectibles. In or about 2005, I
17 was promoted to Vice President of International and my responsibilities increased to cover sales
18 and distribution of Upper Deck's core products in Latin America. In 2007, my title changed to
19 Vice President of Global Business Development. This was a shift in responsibility away from the
20 bottom line sales-driven responsibilities and more towards global business development activities,
21 which focused on original intellectual property development. Part of my responsibilities as
22 Managing Director of Asia Pacific and Vice President of International included the responsibility
23 for negotiating agreements with third parties such as Aniplex relating to "Kiba." I was the person
24 at Upper Deck responsible for the management.

25 3. In 2003, Upper Deck was approached by the Japanese Exchange Association
26 ("JEA"), who held itself out as a representative of Dream Ranch, Inc. ("Dream Ranch"), regarding
27 a merchandising license for products based on artwork and characters created by the Japanese
28 artist, Susumu Matsushita, entitled "Kiba."

1 4. Dream Ranch, by and through JEA, represented that there would be other licensees
2 involved in the project, specifically, licensees for an animated television series, manga and video
3 games. Attached hereto as Exhibit 1 is a true and correct copy of a January 20, 2003 email from
4 Richard Privman at JEA to Jerry Bennington and myself describing the various potential "Kiba"
5 licensees.

6 5. On or about July 23, 2003, Upper Deck entered into a license agreement with Dream
7 Ranch granting Upper Deck a license to create and sell trading cards and other merchandise based
8 on the "Kiba" intellectual property in exchange for an initial minimum guarantee payment of \$3
9 million. A true and correct copy of the July 23, 2003 agreement is attached hereto as Exhibit 2.

10 6. In or about late 2003, Aniplex, Inc. ("Aniplex") became involved in the "Kiba"
11 project as an anime producer. In or about late 2003, Aniplex approached Upper Deck about
12 investing in a joint venture with Aniplex to produce an anime television series and to exploit the
13 broadcast, home video and merchandising rights based on the "Kiba" intellectual property.

14 7. I, and members of my team at Upper Deck, told Aniplex that Upper Deck would
15 only invest in the "Kiba" joint venture if Upper Deck had an approval right over creative elements
16 in the anime series. This approval right was important to Upper Deck to ensure that the series
17 included the merchandising elements necessary to promote Upper Deck's planned "Kiba" TCG,
18 and to ensure that Upper Deck could exploit the Kiba anime series in the markets anticipated as its
19 exclusive territory. For example, attached hereto as Exhibit 3 is a true and correct copy of a
20 December 19, 2003 email from Reid Middleton to Shigekazu Takeuchi of Sony Music
21 Entertainment Japan ("Sony Music"), Aniplex's parent company, copying myself and others,
22 attaching Upper Deck's comments to Aniplex's initial proposal for the "Kiba" anime. The
23 proposal states "[t]he parties shall use best efforts to work together to develop the episodes with
24 ample consideration given to ultimately merchandising the Property. ***Aniplex shall not release an***
25 ***episode without first obtaining the approval of Upper Deck.***" (Emphasis added).

26 8. In or about 2004, Aniplex agreed that the elements necessary to drive sales of Upper
27 Deck's TCG would be incorporated into the content of the "Kiba" anime series. In or about 2004,
28

1 Aniplex also represented and promised that Upper Deck would have a creative voice in the “Kiba”
2 anime.

3 9. In late 2004, Upper Deck and Aniplex began negotiating several “long form”
4 agreements memorializing their overall agreement relating to the licensing of the “Kiba”
5 intellectual property and the production of the “Kiba” anime series. Numerous drafts of the “long
6 form” agreements were circulated and commented upon by both Upper Deck and Aniplex. All of
7 the draft “long form” agreements that reflected Aniplex’s license of rights in the “Kiba” intellectual
8 property to Upper Deck contained a representation and warranty to the effect that Aniplex had
9 obtained all necessary licenses, rights and contents for the exploitation of the “Kiba” property.
10 Attached hereto as Exhibit 4 are true and correct copies of a draft “License Agreement” and draft
11 “Television & Videogram License Agreement” attached to a January 26, 2005 email from Asa
12 Suehira to myself and others and a draft “License Agreement” and draft “Television and
13 Videogram License Agreement” attached to an July 6, 2005 email from Paul Swanson to Asa
14 Suehira, myself and others.

15 10. In October 2005, Asa Suehira requested that the parties delay further negotiations of
16 the “long form” agreements and instead prepare a summary of the deal terms in the form of a short
17 form agreement (the “Short Form”). Attached hereto as Exhibit 5 is a true and correct copy of an
18 October 4, 2005 email from Asa Suehira to myself reflecting that request.

19 11. During the negotiations of the Short Form, Aniplex initially resisted giving Upper
20 Deck a written approval right over the creative content of the “Kiba” anime. Attached hereto as
21 Exhibit 6 is a true and correct copy of an October 20, 2005 email from Asa Suehira to Joshua
22 Grode, myself and others attaching comments to the draft Short Form and stating “UD will have no
23 approval over the creative.” I insisted, however, that the written agreement include a provision
24 giving Upper Deck creative approvals over the merchandising elements of the “Kiba” series.
25 Aniplex eventually agreed to give Upper Deck an approval right in or about November 2005.

26 12. On or about December 10, 2005, the parties executed the Short Form. The Short
27 Form contemplated that the parties would continue their negotiations on the “long form”
28 agreements and execute those agreements shortly after the Short Form was signed. Despite

1 Aniplex's initial resistance, the Short Form contained the following provision relevant to Upper
2 Deck's right to approve the creative content in the "Kiba" anime:

3 UD and ANX have mutual approval over the script, main
4 character, designs and animatic for each episode. In the event of a
5 deadlock, UD's decision controls with respect to merchandising
6 components (e.g., the number of shard battles between characters)
7 and ANX's decision controls in all other areas/components.

8 The Short Form also contained a provision requiring Aniplex to provide Upper Deck with
9 each written agreement entered into by the "Kiba" joint venture or by Aniplex on behalf of the joint
10 venture, and requiring that Aniplex provide Upper Deck with a summary of the material terms and
11 conditions of each verbal agreement entered into by the joint venture or by Aniplex on behalf of the
12 joint venture. Attached hereto as Exhibit 7 is a true and correct copy of the Short Form.

13 13. Immediately after the Short Form was executed the parties exchanged revised drafts
14 of the "long form" agreements, but they were not executed. The draft agreements which reflected
15 Aniplex's license of rights in the "Kiba" intellectual property to Upper Deck continued to include a
16 representation and warranty to the effect that Aniplex had obtained all necessary licenses, rights
17 and consents required for the exploitation of the "Kiba" property. Attached hereto as Exhibit 8 are
18 true and correct copies of a draft "License Agreement" and a draft "Television & Videogram
19 License Agreement" attached to a January 18, 2006 email from Asa Suehira to me.

20 14. I am informed that there is an agreement between Aniplex and Madhouse, Inc.
21 ("Madhouse"), the company responsible for the actual production of the "Kiba" anime series (the
22 "Madhouse Agreement"). I am informed and believe that prior to commencement of this lawsuit,
23 Aniplex did not provide a copy of the Madhouse Agreement to Upper Deck.. As the person at
24 Upper Deck in charge of the management of the "Kiba" project, if Aniplex had provided a copy of
25 the Madhouse Agreement to Upper Deck, it would have been brought to my attention. Prior to the
26 commencement of this lawsuit, I never saw a copy of the Madhouse Agreement.

27 15. I am informed that the Madhouse Agreement does not give Aniplex the right to
28 require that Madhouse follow Aniplex's or Upper Deck's instructions regarding the creative

1 content of the "Kiba" anime series. As the person at Upper Deck in charge of the management of
2 the "Kiba" project, if I had known that Aniplex lacked the ability to require Madhouse to make
3 Upper Deck's requested changes to the creative content in the "Kiba" anime series, Upper Deck
4 would not have entered into the Short Form with Aniplex.

5 16. By July 2006, I became increasingly concerned that the "Kiba" anime series failed
6 to include the merchandising elements that were essential to drive the sales of Upper Deck's
7 "Kiba" TCG, and that the television series was inappropriate for television broadcast in any market
8 in Upper Deck's exclusive territory. This led to a payment dispute between Aniplex and Upper
9 Deck under the Short Form.

10 17. Upper Deck's "Kiba" TCG was released in Japan in July 2006.

11 18. I am informed that on or about July 25, 2006, Susumu Matsushita Enterprises, Inc.
12 ("SME"), through its representative, sent Aniplex a letter stating that the "Kiba" anime series and
13 Upper Deck's "Kiba" TCG were unauthorized uses of the "Kiba" intellectual property ("SME
14 Claim Letter"). I am informed and believed that prior to commencement of this lawsuit, Aniplex
15 did not provide a copy of the SME Claim Letter to Upper Deck and did not bring SME's claims, as
16 detailed in that letter, to Upper Deck's attention in any manner. As the person at Upper Deck in
17 charge of the management of the "Kiba" project, if Aniplex had provided a copy of the SME Claim
18 Letter to Upper Deck, it would have been brought to my attention. Prior to commencement of this
19 lawsuit, I never saw a copy of the SME Claim Letter, nor was I made aware of the claims made in
20 that letter.

21 19. On or about August 4, 2006, Aniplex sent Upper Deck a letter claiming that Upper
22 Deck was in breach of the Short Form. A true and correct copy of that letter is attached hereto as
23 Exhibit 9.

24 20. On or about August 17, 2006, Upper Deck sent a letter to Aniplex denying that it
25 was in breach of the Short Form and notifying Aniplex that it was in material breach of the Short
26 Form by violating Upper Deck's approval rights. Attached hereto as Exhibit 10 is a true and
27 correct copy of that letter.
28

1 21. In August 2006, when the above-referenced letters were sent, I am informed and
2 believed that Aniplex still had not informed Upper Deck of the terms of the Madhouse Agreement
3 or the rights issues raised in the SME Claim Letter. As the person at Upper Deck in charge of the
4 management of the "Kiba" project, if Aniplex had informed Upper Deck of these issues, I would
5 have been made aware of them, and I was not.

6 22. From in or about September 2006 through early 2007, Aniplex and Upper Deck
7 began negotiating a revision to the payment schedule in the Short Form in a draft agreement
8 entitled the Amended and Restated Short Form Agreement ("A&R Short Form"), which was not
9 executed by the parties. The unsigned "A&R Short Form" contained the same creative approval
10 provision as in the Short Form. The "A&R Short Form" also contained the same provision
11 requiring Aniplex to provide Upper Deck with each written agreement entered into by the "Kiba"
12 joint venture or by Aniplex on behalf of the joint venture, and requiring that Aniplex provide Upper
13 Deck with a summary of the material terms and conditions of each verbal agreement entered into
14 by the joint venture or by Aniplex on behalf of the joint venture.

15 23. On or about January 26, 2007, Aniplex sent Upper Deck another letter claiming that
16 Upper Deck was in breach of the parties' agreement and demanding immediate payment by Upper
17 Deck. Attached hereto as Exhibit 11 is a true and correct copy of that letter.

18 24. I am informed and believed that at the time the January 2007 letter was sent,
19 Aniplex still had not informed Upper Deck of the terms of the Madhouse Agreement or the rights
20 issues raised in the SME Claim Letter. I am informed and believed that Upper Deck was unaware
21 of both the terms of the Madhouse Agreement and the issues raised in SME Claim Letter. As the
22 person at Upper Deck in charge of the management of the "Kiba" project, if Aniplex had informed
23 Upper Deck of these issues, I would have been made aware of them, and I was not.

24 25. I am informed that Aniplex entered into agreements with Dream Ranch and SME in
25 May 2007 that, for the first time, granted Aniplex a license related to the "Kiba" intellectual
26 property. I am informed and believed that prior to the commencement of this action, Aniplex never
27 provided a copy of those May 2007 agreements to Upper Deck. As the person at Upper Deck in
28

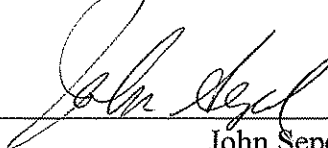
1 charge of the management of the "Kiba" project, I would have been made aware of them. I never
2 saw those agreements.

3 26. As the person at Upper Deck in charge of the management of the "Kiba" project, if I
4 had known that neither Mr. Matsushita nor SME had consented to the license of the "Kiba"
5 intellectual property in 2005, when Aniplex and Upper Deck were negotiating the Short Form,
6 Upper Deck would not have entered into the Short Form with Aniplex and would have ceased
7 negotiations regarding the A&R Short Form in late 2006 and early 2007.

8 27. The SME Claim Letter and the fact that Aniplex did not have the right to license the
9 "Kiba" intellectual property until May 2007, would have been material to Upper Deck's decision
10 regarding how to proceed with the "Kiba" project and how to respond to Aniplex's notices of
11 breach in August 2006 and January 2007.

12 I declare under penalty of perjury that the foregoing is true and correct.

13
14 Executed on this 28th day of July, 2010, at Irvine, California.

15
16 
17 John Sepenuk